Ismail bin Abd Hamid v Ketua Polis Daerah Timur Laut Pulau Pinang & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01–206 OF 2010

ZAINUN ALI FCJ, RAMLY ALI AND ZAHARAH IBRAHIM JJCA

28 MARCH 2012

Civil Procedure — Appeal — Appeal against judgment of High Court — Disciplinary action under Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 — Charge under Police Officers (Conduct and Discipline) Regulations 1993 — Dismissal as corporal — Whether charge appropriate for junior officer position — Application for judicial review — Whether dismissal lawful

The appellant, a corporal of the police force, was notified that a disciplinary action was to be taken against him under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the 1970 Regulations'). However, the charge against the appellant was made for the offence of misuse or abuse of drugs under the Police Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). An orderly room proceeding was held and the appellant was found guilty of the charge and was dismissed on the same day. The appellant applied for a judicial review for a declaration that his dismissal from the police force was unlawful, claiming that the charge was null, void and of no effect as it was framed outside the 1970 Regulations. The application was dismissed by the High Court. Dissatisfied, the appellant filed the present appeal with the contention that the 1993 Regulations, of which the charge against him was framed, were applicable to senior police officers. The appellant averred that the charge against him under the 1993 Regulations was illegal and unlawful as he was governed by the 1970 Regulations since he was a corporal.

Held, allowing the appeal with costs:

(1) The learned High Court judge had erred in dismissing the appellant's application for judicial review. There were sufficient grounds to allow the appeal as it related to no offence as far as the appellant, as a junior police officer, was concerned. If at all the appellant needed to be charged, the charge should be under the 1970 Regulations, not the 1993 Regulations. Consequently, the appellant's dismissal in the present case was unlawful, void and of no effect (see paras 13 & 16).

(2) The appellant being a corporal in the police force came under the

category of junior police officers. Regulation 1(2)(a) of the 1970 Regulations clearly provides that 'these Regulations shall apply throughout Malaysia and to (a) all junior police officers and constables recruited in the States of Malaya'. Therefore, it can safely be concluded that the 1993 Regulations were not applicable to junior police officers and therefore not applicable to the appellant (see para 8).

(3) The 1970 Regulations were specific regulations applicable to 'all junior police officers and constables recruited in the State of Malaya', in relation to disciplinary proceedings. The provisions of the 1993 Regulations could not apply in the 1970 Regulations on the ground that importing those provisions in the 1993 Regulations into the 1970 Regulations would amount to adding words and violating the 1970 Regulations (see paras 9 & 15).

[Bahasa Malaysia summary

Perayu, seorang berpangkat koperal dalam pasukan polis, diberitahu yang tindakan tatatertib akan dikenakan terhadapnya di bawah Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-pegawai Rendah Polis dan Mata-Mata) ('Peraturan-Peraturan 1970'). Walau bagaimanapun, tuduhan terhadap perayu dibuat kerana kesalahan salah guna atau penyalahgunaan dadah di bawah Peraturan-Peraturan Pegawai-Pegawai Polis (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan 1993'). Prosiding pemerhatian diadakan dan perayu didapati bersalah terhadap tuduhan dan dibuang kerja pada hari yang sama. Perayu memohon untuk semakan kehakiman untuk perisytiharan bahawa pembuangan kerjanya daripada pasukan polis adalah tidak sah dari segi undang-undang, mendakwa bahawa tuduhan adalah terbatal dan tak sah dan tidak berkesan memandangkan ia dirangka di luar Peraturan-Peraturan 1970. Permohonan ditolak oleh Mahkamah Tinggi. Tidak puas hati, perayu memfailkan rayuan ini dengan berhujah bahawa Peraturan-Peraturan 1993, di mana tuduhan terhadapnya dirangka, beraplikasi kepada pegawai-pegawai kanan polis. Perayu berhujah bahawa tuduhan terhadapnya di bawah Peraturan-Peraturan 1993 adalah tidak sah dan salah dari segi undang-undang kerana dia dikawal oleh Peraturan-Peraturan 1970 memandangkan dia adalah koperal.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim Mahkamah Tinggi yang bijaksana telah tersilap dalam menolak permohonan perayu untuk semakan kehakiman. Terdapat alasan-alasan yang mencukupi untuk membenarkan rayuan tersebut kerana ia tidak berkaitan dengan apa-apa kesalahan yang berkaitan dengan perayu, sebagai pegawai rendah polis. Jika perayu perlu dituduh, tuduhan sepatutnya di bawah Peraturan-Peraturan 1970, bukan

Peraturan-Peraturan 1993. Oleh itu, pembuangan kerja perayu dalam kes ini adalah tak sah, terbatal dan tidak berkesan (lihat perenggan 13 & 16).

(2) Perayu berpangkat koperal di dalam pasukan polis berada di bawah kategori pegawai-pegawai rendah polis. Peraturan 1(2)(a) Peraturan-Peraturan 1970 jelas memperuntukkan bahawa 'these Regulations shall apply throughout Malaysia and to (a) all junior police officers and constables recruited in the States of Malaya'. Oleh itu, adalah selamat untuk memutuskan bahawa Peraturan-Peraturan 1993 tidak beraplikasi kepada pegawai-pegawai rendah polis dan dengan itu tidak beraplikasi kepada perayu (lihat perenggan 8).

(3) Peraturan-Peraturan 1970 adalah peraturan-peraturan spesifik yang beraplikasi kepada 'all junior police officers and constables recruited in the State of Malaya', berkaitan dengan prosiding tatatertib. Peruntukan Peraturan-Peraturan 1993 tidak boleh diguna pakai dalam Peraturan-Peraturan 1970 atas alasan bahawa membawa masuk peruntukan-peruntukan dalam Peraturan-Peraturan 1993 ke dalam Peraturan-Peraturan 1970 merupakan menambahkan perkataan-perkataan dan mencabuli Peraturan-Peraturan 1970 (lihat perenggan 9 & 15).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374, HL (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952
Federal Constitution art 132
Medical Act 1971
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 1(2)(a), 2, 3, 3(1), Schedule, Item 8
Police Act 1967 s 96(1), (2)
Public Officers (Conduct and Discipline) Regulations 1993 reg 7

Appeal from: Civil Suit No. 22-104 of 2003 (High Court, Pulau Pinang)

M Athimulan (Norrizan Ahmad with him) (Athimulan & Co) for the appellant.
Effendi Nazila Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] The appellant was a corporal in the police force until he was dismissed on 24 February 2000. By a letter dated 31 January 2000 he was notified that a disciplinary proceeding was to be taken against him under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the 1970 Regulations') on a disciplinary charge. However, the charge against the appellant was made under the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations').

[2] On 24 February 2000 an orderly room proceeding was held and the appellant was found guilty of the charge. He was dismissed on the same day.

[3] The appellant filed an application for judicial review for a declaration that his dismissal from the police force was unlawful on the ground that the charge against him was null, void and of no effect as it was framed outside the 1970 Regulations; and therefore it was illegal to conduct and proceed with the disciplinary proceedings against him upon the said charge.

[4] The High Court, on 24 February 2010 dismissed the appellant's application. The appellant then filed the present appeal before this court against the said dismissal of his application.

[5] The disciplinary proceedings against the appellant started with the formal notification 'Pemberitahu Pertuduhan Tatatertib' dated 31 January 2000 issued by the 'Pegawai Pengadil' to the appellant to the effect, inter alia, that 'untuk mengambil tindakan tatatertib terhadap anda di bawah Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai Rendah Polis dan Mata-Mata) 1970 - P.U. (A) 86 bertarikh 28 February 1970 dan P.U. (A) Pindaan 56 bertarikh 23 February 1984 di atas pertuduhan tatatertib'.

[6] The charge against the appellant was framed under the 1993 Regulations (not under the 1970 Regulations) as follows:

> Bahawa kamu Koperal 57561 Ismail bin Abd Hamid, ketika itu bertugas di Balai Polis Dato Kramat, di dalam Daerah Timur Laut, di dalam Kontinjen Negeri Pulau Pinang, telah didapati ingkar perintah kepada kehendak Peraturan 7 Peraturan-peraturan Pegawai Awam 1993 iaitu dengan menyalahgunakan atau menagih dadah berbahaya di mana contoh air kencing diambil pada 9 Ogos 1999 disahkan 'Positif Cannabinoids' oleh Ahli Kimiahayat, Jabatan Patologi, Hospital Pulau Pinang maka dengan yang demikian kamu telah melanggar tata kelakuan di bawah Peraturan 4(2)(i) Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[7] The appellant contended that the 1993 Regulations (under which the charge was framed against him) were applicable to senior police officers, but not to the appellant who was a corporal (a junior police officer), who was governed by the 1970 Regulations. As such the appellant claimed that the charge against him under the 1993 Regulations was therefore illegal and unlawful.

[8] It is not in dispute that the appellant being a corporal in the police force came under the category of junior police officers. Regulations 1(2)(a) of the 1970 Regulations clearly provides that 'these Regulations shall apply throughout Malaysia and to (a) all junior police officers and constables recruited in the States of Malaya'. Therefore, it can safely be concluded that the 1993 Regulations are not applicable to junior police officers and therefore not applicable to the appellant.

[9] The 1970 Regulations are specific regulations applicable to 'all junior police officers and constables recruited in the State of Malaya', in relation to disciplinary proceedings. Regulation 3(1) of the 1970 Regulations clearly provides that 'a charge shall be framed in accordance with the offence as prescribed in the Schedule; and the charge shall describe the offence briefly and identify the officer with the unlawful act or omission charged'. Regulation 2 of the same Regulations further provides that any officer who is found guilty of a disciplinary offence as specified in the Schedule hereto shall be liable to any punishment as specified in that Schedule.

[10] The above provisions clearly indicate the intention that all junior police officers and constable (including the appellant) must be charged in accordance with the offence prescribed in the Schedule to the 1970 Regulations and shall be liable to punishment specified in the same Schedule, not any other regulations.

[11] The offence charged against the appellant in the present case, as clearly stated in the charge itself, under reg 7 of the 1993 Regulations relates to the offence of 'ingkar perintah kepada kehendak Peraturan 7 Peraturan-Peraturan Pegawai Awam 1993 iaitu dengan menyalahgunakan atau menagih dadah berbahaya'. While the related offence under item 8, of the Schedule to the 1970 Regulations relates to an offence of 'while on or off duty renders himself unfit for duty through over indulgence in intoxicating liquor or narcotics'. The two offences under the two Regulations are different in nature, involving different ingredients to be proved against the offender. The 1970 Regulations were made under s 96(1)–(2) of the Police Act 1967; whilst the 1993 Regulations were made under art 132 of the Federal Constitution.

[12] The offence provisions specified under reg 7 of the 1993 Regulations

(under which the appellant was charged) provide that an officer shall not use or consume (except for his medical purposes as prescribed by a medical practitioner who is registered under the Medical Act 1971) or abuse or be addicted to any dangerous drug; and for the purpose of the regulation, 'dangerous drug' means any drug or substance listed in the First Schedule to the Dangerous Drugs Act 1952. Whilst Item 8 of the Schedule to the 1970 Regulations states: 'Any junior police officer or constable who (8) while on or off duty renders himself unfit for duty through over indulgence in intoxicating liquor or narcotics … shall be guilty of an offence against discipline and shall be liable to any of the following punishments …'

[13] On that basis, we are of the view that the charge framed against the appellant in the present case is illegal and unlawful. It relates to no offence as far as the appellant, as a junior police officer, is concerned. If at all the appellant needs to be charged, the charge should be under the 1970 Regulations, but not under the 1993 Regulations. Consequently, the appellant's dismissal in the present case is unlawful, void and of no effect.

[14] In the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374 it was clearly held that 'illegality' can be a ground for judicial review. The adjudicating authority in the present case must understand directly the law that regulates his decision making power and must give effect to it.

[15] The provisions of the 1993 Regulations cannot apply in the 1970 Regulations on the ground that importing those provisions in the 1993 Regulations into the 1970 Regulations would amount to adding words and violating the 1970 Regulations. This principle was stressed by the Federal Court in the case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777. A charge under the 1993 Regulations cannot be imposed in the 1970 Regulations as the Schedule to the 1970 Regulations has already been made in the 1970 Regulations and reg 3 thereof is clear in that 'a charge shall be framed in accordance with the offence as prescribed in the Schedule'.

[16] On this ground alone, we are satisfied that the learned High Court judge had erred in dismissing the appellant's application for judicial review. We are also satisfied that on the facts of the present case, there are sufficient grounds to allow judicial review as applied for by the appellant. On this ground alone,

the appeal before us can and should be allowed.

CONCLUSION

[17] On the above considerations, we therefore allow the appeal with costs of RM5,000 to the appellant. We also make an order that the deposit be refunded to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor